SUPREME COURT, U. S.
No. 72-1554
FILED
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Supreme Court of the United States

October Term, 1973

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHARVITE
Petitioners

v.

LLOYD W. MCCORKEL, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STERNE, Director of the Camden County New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION No. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus*, in support of the position of the respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 113 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. The discussion which follows is directed to demonstrating that should this Court, contrary to the Court of Appeal's conclusion (A. 47-65), rule that this case is not moot,[1] the proper disposition would be to affirm the District Court's dismissal of the complaint as failing to state a valid cause of action. A. 46.[2]

Here, the Super Tire Engineering Company is "challenging the following three programs: Aid for Dependent Children (A.F.D.C.), N.J. S.A. 44:10-1 *et seq.*, a joint state-federal program; Aid to Families of the Working Poor, N.J. S.A. 44:13-1 *et seq.*, a state program; General Public Assistance, N.J. S.A. 44:8-107 *et seq.*, a state program," (A. 48 n. 1), because, during a lawful six week economic strike against the Company (now concluded), "many of the strikers were receiving welfare assistance from the State of New Jersey," (Co. Br. p. 4). The gravamen of the complaint, which was filed against the state officials who administer the programs just noted,[3] is that these

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[1] Teamsters Local Union No. 676 in its brief to this Court has developed in detail the proposition that this proceeding is moot. We fully agree with the points made therein and to avoid needless repetition adopt them by reference. Naturally, affirmance of the Court of Appeals mootness holding would pretermit consideration of the issue discussed herein.

[2] "A" references are to the printed Appendix filed in this Court. "Co. Br." references are to the brief filed in this Court by the petitioners, Super Tire and A. Robert Schaevitz, the Company's president.

[3] The District Court granted the timely motion of Teamsters Local Union No. 676 to intervene and align itself with the state defendants. A. 1.

"directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U.S.C. §§ 157-8, and are unconstitutional because they contravene the Supremacy Clause of the U.S. Constitution," (A. 48).[4] The predicate of Super Tire's theory is that the "instant case raises a * * * Supremacy Clause question of [great] magnitude: the permissible extent of state power, albeit perhaps directed at non-labor objectives, to alter the collective bargaining process." Co. Br. pp. 20-21.

2. The claim that New Jersey's administration of the first of the three programs challenged—"Aid for Dependant Children (A.F.D.C.), N.J. S.A. 44:10-1 *et seq.*, a joint state-federal program" (A. 48 n.1)—raises a "Supremacy Clause question" is frivolous.

The Supremacy Clause precludes state "impair[ment] of federal superintendence of the field" regulated by federal law. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142. In this case the state is administering a joint state-federal program in conformity with federal law as declared in *Davidson* v. *Francis*, 409 U.S. 904 summarily affirming

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[4] The Court of Appeals went on to note that the Company:

"further assert[s] that the inclusion of striking employees in the programs abridges the federal statute under which one of the programs is funded, and the New Jersey statutes pursuant to which the state officials have promulgated regulations affecting striking employees." A. 48-49.

In this Court the Company does not mention these latter points. See Co. Br. 7-8, 19-27. For this reason and since our response to the contention pressed here makes it plain that these statutory arguments are also without substance we do not treat them separately.

340 F.Supp. 351 (D. Md.). This guarantees the integrity of "federal superintendence of the field."

(a) In *King* v. *Smith*, 392 U.S. 309, 316-317, this Court explained:

> "The AFDC program is based on a scheme of cooperative federalism. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW." Footnotes and citations omitted.

New Jersey's policy with respect to AFDC payments in a strike context is that: "persons unwilling to work are ineligible for public assistance;" that "when an individual is participating in lawful 'strike,' he may not be considered merely because of such participation, as refusing to work without just cause;" and that an "individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy." A. 129-131.

The square holding of *Davidson* is that in enacting the AFDC program:

> "Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those

out of work because of involvement in labor disputes, or (3) to leave that decision to each state." 340 F.Supp. at 367.[5]

The Secretary's undeviating "policy" has been to follow the third course noted in *Davidson,* viz., "to leave [the] decision * * * [whether] to include or * * * to exclude from its respective AFDC-E programs those out of work because of involvement in labor disputes * * * to each state." See 38 F.R. 49. And the Secretary's present regulations embody this policy in the clearest terms. A. 123-125.[6]

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[5] In *Davidson* the further requirements which must be respected if the third alternative is followed are stated as follows:

> "In order otherwise to qualify, * * * a father [who is employed less than the number of hours in the month in question specified in 45 CFR § 233.100(a)(1)] must not have available to him from his own resources or other sources including strike benefits assets or income which place him outside of the needy category. Further, he must register for other work and for retraining and accept and participate in both in good faith. Considered in their sum total, the statute and the regulations provide safeguards to ensure that only needy fathers who are willing to be retrained if necessary, and to engage in other employment, can qualify for benefits which are made available primarily to help the children of such fathers." *Id.* at 367-368.

The Company has not argued that New Jersey has failed to abide by these conditions.

[6] 45 CFR § 233.100 as it stood from 1969 until July 12, 1973 (A. 121-123) contained an imperfect expression of the Secretary's policy which *Davidson* read as commiting him to the first alternative noted in the opinion—"requir[ing] each participating state to include * * * those out of work because of involvement in labor disputes." See 340 F.Supp at 366-368.

This is of no aid to the Company here for its position is that there should be a per se exclusion of strikers.

In short, in dealing with the extent to which AFDC payments would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress "chose to abandon any search for uniformity * * * and decided to suffer a medley of attitudes and philosophies on the subject," (*Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 104-105). Thus, a state decision to utilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in n. 5, p. 5 *supra* are observed), no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn, id.* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action. When, as in this case, a challenge is leveled at that policy it raises a question as to the interrelation of federal statutes and not a question of the extent of federal supercession of state law.

(b) As we have seen, the Company argues that AFDC payments in a strike context "directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U.S.C. §§ 157-8" (A. 48). See Co. Br. pp. 7-8, 21-23. We have also seen that the holding in *Davidson* is that Congress, in the Social Security Act, "empowered the Secretary [of HEW] by regulation" to, as he has in fact done, permit the States to make AFDC payments to "those out of work because of involvement in labor disputes," if they so desire, (340 F.Supp. at 367). That holding constituted a considered rejection of the "strenuously urg[d] argument of the "national Chamber of Commerce:"

"that the Congress has clearly indicated, through its

> labor legislation, and in other ways that it did not intend to lend governmental support to those out of work because of labor disputes." *Ibid.*

Thus, the Company's position in this case has already been scrutinized by this Court and found wanting. Therefore, it is only for the sake of completeness that we, at this point, briefly outline the basic flaws in Super Tire's conception of the national labor policy.

When two federal enactments, rather than a federal and a state statute, are alleged to be in conflict, both, since they are equally Congress' product, stand on an equal footing. The national policy of free collective bargaining embodied in the NLRA is, of course, a cornerstone of our system. So too is the national policy of "keeping dependant children within a family," which Congress has been so "desirous" of achieving that it has provided that AFDC payments "could go to children whose need arose merely from their parents' unemployment, under federally determined standards, although the parent was not incapacitated." *Dandridge* v. *Williams,* 397 U.S. 471, 479. It, therefore, becomes "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Boys Markets* v. *Clerks Union,* 398 U.S. 235, 251. In doing so, "the purpose of Congress is the ultimate touchstone." *Schermerhorn,* 375 U.S. at 103.

As *Boys Market* indicates, where Congress has not directly addressed the problem presented, ascertaining its purpose is a complex and delicate undertaking. No such undertaking is required in this instance. Congress has made explicit its purpose to permit AFDC payments in the strike context.

Congressman Mills, the Chairman of the House Ways and Means Committee, and the floor manager of the 1961 amendment to the Social Security Act, 42 U.S.C. § 607, extending AFDC to needy families with dependant children headed by an unemployed parent (in addition to those in which a parent has died or is absent or incapacitated), engaged in the following colloquy with Congressman Dominick of Colorado:

> "*Mr. Dominick:* * * * But it is possible is it not under the laws of some of the states * * * for this money to be used in the case of persons who are unemployed by reason of labor disputes?
>
> *Mr. Mills:* If the states were desirous of using their own funds to take care of a person who may be unemployed as a result of a labor dispute I must admit that the state could get Federal funds under this program to implement that * * *. Whether or not the state would say that the person was in need under the state program as set up under this, I do not know, but the state could do it. It is possible.
>
> *Mr. Dominick:* It is possible that general taxpayers' funds would be funneled into support of children of people who are unemployed by reasons of a labor dispute?
>
> *Mr. Mills:* If the state finds that those children are in need as a result of that, that is true. The primary question is need. That is the first test—are the children in need. The state determines need." 107 Cong. Rec. 3766.[7]

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[7] A theme in the 1961 legislative history is that AFDC should be limited to the "involuntarily unemployed." See *Davidson*, 340 F.Supp. at 375-377. But as Congressman Mills' remarks demon-

This explanation of the bill's purpose was not challenged. It is, of course, perfectly consistent with the statute's language, and with the overall "scheme of cooperative federalism" embodied in the AFDC program (*King* v. *Smith*, 392 U.S. at 316). Nor, so far as we are aware, was the subject of AFDC payments in the strike context dealt with at any other point in the legislative history. Subsequent to this colloquy this amendment to the Social Security Act was enacted by the House and Senate without change in any respect here relevant and signed by the President.

New York Dept. of Social Services v. *Dublino*, 413 U.S. 405 raised the question of whether Congress intended to allow the states participating in AFDC to adopt their own work incentive programs, an issue closely related to that here. The Court there recognized that, in light of his position, Congressman Mills' *post*-enactment response to inquiries concerning the area of discretion left to the states was "perhaps the most revealing legislative expression" of the Congressional purpose. 413 U.S. at 416-417, n. 19. Certainly then, his explanation of the scope of authority Congress intended to preserve for the states with regard to AFDC payments in the strike context, made prior to the passage of the 1961 amendments, is authoritative.

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strate, Congress was not of the view that those on strike are "voluntarily" unemployed. Moreover, Congress served this concern, not by disqualifying any group as a class, but by precluding the payment of benefits to individuals who "*without good cause* • • • refuse a bona fide offer of employment," (42 U.S.C. §607(b)(1)(B); emphasis added), and by leaving it to the states to determine when a refusal is "without good cause," (see *Davidson*, 340 F.Supp. at 376-377).

Moreover, the "policy" of the Secretary of HEW in administering the law has been in precise conformity with Congressman Mills' directions. See p. 5 *supra*. Compare, e.g., *Udall* v. *Tallman*, 380 U.S. 1, 16-18. And as recognized in *Davidson*, 340 F.Supp. at 367, while Congress modified 42 U.S.C. § 607 in 1967, it did not question this established administrative practice in debate, nor did the legislation enacted call for a change in that practice. Compare, e.g. *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366. Thus, the legislative materials demonstrate that the Social Security Act can only be read as it was in *Davidson*.

This conclusion is entirely consistent with the "federal labor policy" of "free collective bargaining" (Co. Br. p. 8), as Congress has understood that policy. The Company's basic thesis is that the NLRB should be read to mandate an economic struggle hermetically insulated from the impact of Congressional enactments of general application. But it is not even theoretically possible for Congress to exercise its authority to formulate national economic and social policy without enacting legislation affecting "the balance of power between labor and management" (cf. Co. Br. p. 8).

For example, one of management's basic economic weapons is the right to continue business in the face of a strike by utilizing strike replacements. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. That weapon's utility, especially for a low wage employer, rests on the availability of a pool of the unemployed. Congress, however, has committed itself in the Employment Act of 1946, 15 U.S.C. § 1021, to the establishment of full employment. The degree to which the mandate of the Employment Act is fulfilled has direct and immediate consequences for "the balance of

power between labor and management." Again, Congress has all but plenary power in setting government contracting policy. See e.g. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. But it has not utilized that authority to refuse to do business with employers who continue their operations during a strike. The impact on labor disputes of its refusal so to do is obvious and often decisive. The number of such examples that could be cited is limitless. For the economy is a seamless web, the basic shape of which in this day and age is pervasively influenced by federal monetary, fiscal, and regulatory policy.

Thus, Super Tire's conception of the national labor policy is one that has no place in the real world. It is, therefore, not surprising that the Company can not point to a single instance in which Congress's actions, or its refusal to act, can be squared with that construct. To the contrary, so far as we are aware, Congress has consistently treated employers and employees engaged in a labor dispute as eligible for the benefits of economic and social legislation of general application for which they are otherwise qualified. The clearest instance of the dominance of this policy, aside from government contracting and AFDC, is the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, which provides sustaining assistance to needy families. Management has made a determined effort to exclude the families of strikers from this program. Congress has responded by including them because in its view to do otherwise would be "to take sides in labor disputes." H.R. Rep. 1402, 91st Cong., 2d Sess., p. 11. And the view stated in the House Report is the polar opposite of the Company's view of what constitutes government neutrality in a labor dispute.

3. New Jersey's policy for administering AFDC in the strike context is precisely that which the State also follows in the two state statutes also challenged—Aid to Families of the Working Poor, N.J. S.A. 44:13-1 *et seq.* and General Public Assistance, N.J. S.A. 44:8-107 *et seq.* See A. 129-132. Thus what has been shown thus far entails the conclusion that as a matter of principle these state laws are in conformity with federal policy. And, this Court's decisions culminating in *Dublino*, 413 U.S. at 413-422 (citing and describing the prior authority) establish that AFDC is not a program that occupies the field so as to displace "supplementary [State] efforts toward [the] very same end" pursued by federal law (*id.* at 419). This is the case without regard to the level of state benefits. Even under AFDC:

> "each State is free * * * to determine the level of benefits by the amount of funds it devotes to the program.[15]

[15] The rather complicated formula for federal funding is contained in 42 USC § 603. The level of benefits is within the State's discretion, but the Federal Government's contribution is a varying percentage of the total AFDC expenditures within each State. * * * The benefit levels vary greatly from State to State. For example, for May 1967, the average payment to a family under AFDC was about $224 in New Jersey, $221 in New York, $39 in Mississippi, $20 in Puerto Rico, $53 in Alabama."

King v. *Smith*, 392 U.S. at 318-319 & n. 15.

Assuredly then, federal law does not determine the benefits which a State may pay under a parallel program funded entirely by the State.

In short, this aspect of the Company's Supremacy Clause argument, like the rest, is without substance.

CONCLUSION

For the above stated reasons the decision of the Court of Appeals should be affirmed, or in the alternative if this case is not moot, the decision of the District Court dismissing the complaint as failing to state a valid cause of action should be affirmed.

Respectfully submitted,

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Respondents.

Motion for Leave to File Brief and Brief Amicus Curiae by Southern California District Council of Laborers.

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Respondents.

Motion for Leave to File Brief in Amicus Curiae by Southern California District Council of Laborers.

Statement of the Nature of Applicant's Interest.

Applicant, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS represents local unions throughout twelve southern counties of California. It instituted a proceeding in the United States District Court for the Central District of California entitled, "Angel J. Castor et al., Plaintiffs, vs. John Calderas,

etc., et al., Defendants.", Case No. 73-1079-IH. That proceeding was dismissed by the court under the doctrine of abstention requiring plaintiffs to first exhaust their remedies under state administrative and judicial procedures. An administrative hearing has already been held and the parties are awaiting a decision.

The issue is the impact of Sections 1262 and 2677 of the Unemployment Insurance Code of the State of California which deny unemployment insurance benefits to an individual if he left his work because of a trade dispute. The trade dispute which led to the litigation involved a strike which led to the filing of unfair labor practice charges and ultimate settlement of the unfair labor practice charges by the signing of a consent settlement involving reinstatement of employees on the part of the employer.

The questions presented to this Honorable Court in the instant case and upon which certiorari has been granted does not distinguish between economic strikes and unfair labor practice strikes and for that reason this moving party fears that this crucial issue may be disregarded if the court's ruling is as broad as the questions which have been presented to it for review.

This issue is particularly relevant since this Honorable Court may very well determine that federal law preemption may be applicable in unfair labor practice strikes and inapplicable in economic strikes.

Question of Law Which Has Not Been Presented.

WOULD DISQUALIFICATION OF STRIKERS FOR UNEMPLOYMENT OR OTHER PUBLIC BENEFITS VIOLATE FEDERAL LABOR POLICY IF THE STRIKERS ARE ENGAGED IN AN UNFAIR LABOR PRACTICE STRIKE?

Memorandum in Support of Motion.

The federal labor policy enunciated in the National Labor Relations Act, and its successor the Labor Management Relations Act of 1947, as amended, preempts the field and bars state regulation of conduct which is arguably protected or proscribed by the Act.

San Diego Building Trades Council v. Garmon, 359 U.S. 236.

It is not necessary that a state statute seek to regulate preempted conduct. It is sufficient for the sake of preemption that the mere implementation of state policy has an impact upon federal labor policy which is more than peripheral.

Teamsters Local 20 v. Morton, 377 U.S. 252;
Motor Coach Employees v. Missouri, 374 U.S. 74.

Both the National Labor Relations Board and the United States Supreme Court have recognized the significant difference between an economic strike and an unfair labor practice strike. The economic strike is part of the negotiating process and is part of the attempt by the employees to achieve greater benefits than an employer is willing to give. On the other hand, an unfair labor practice strike is a strike of the employees in protest against the violation by their employer of the strictures imposed upon him by Section 8(a) of the Labor Management Relations Act. It is a strike in protest against the employer's violation of the law. This strike may even occur in the face of a collective bargaining agreement containing a "no strike" clause since it is independent of economic interests and it is part of the enforcement of the law.

Mastro Plastics v. NLRB, 350 U.S. 270.

Plaintiffs contend that by throwing the weight of the State of California upon the side of the employer charged with a violation of federal law, the state of California is interfering with federal labor policy.

As the First Circuit has heretofore pointed out, the impact of state action may be indirect and peripheral and still interfere with federal labor policy.

The State of Massachusetts has a mediation and conciliation statute which gives to the Governor the power to direct fact finding in a labor dispute which, in the opinion of the Governor, threatens to seriously affect the public welfare. The decision of the fact finding board is not binding upon the parties to the dispute unless they have specifically agreed to be bound. In the absence of such agreement, the board publishes its decision and its functions thereafter are concluded.

In enjoining the appointment of such a fact finding board to investigate a dispute affecting interstate commerce, the court said that the mere publication of the decision ascertaining which party is "mainly responsible or blameworthy" for the existence of the dispute, would constitute conflict between federal and state labor policy and was therefore beyond the jurisdiction of the state.

General Electric v. Callahan, 29 F.2d 60, 67.

Under the Railway Labor Act, an employee is denied unemployment insurance benefits for engaging in a strike *only* if the Board finds that the strike was commenced in violation of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which the employee is a member. (45 U.S.C. 354(a-2) (iii).)

The status of the unfair labor practice strikers may be compared to the status of civil suiters in antitrust proceedings who are considered, "private attorneys gen-

eral" in aiding and achieving the broad, social objectives of the statute.

Mach-tronics, Inc. v. Zirpoli (CA 9) 316 F.2d 820;

Quemos Theatre Company, Inc. v. Warner Bros. Pictures, Inc. (DC-NJ) 35 F.Supp. 949.

The party, TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, has consented to the filing of this motion, Petitioners do not consent to the filing of an *amicus curiae* brief and respondent public agencies have consented.

WHEREFORE the moving party respectfully moves that it be permitted to appear in *amicus curiae* in support of respondents.

Respectfully submitted,

LIONEL RICHMAN, ESQ.,
Attorney for Southern California District Council of Laborers.